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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY,
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vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

Summary Statement of the Matter Involved

This petition for a writ of certiorari is directed against a judgment of the United States Circuit Court of Appeals for the Fourth Circuit affirming a judgment of conviction for conspiracy in violation of 18 U. S. C. A., Section 88.

Four individuals, including the petitioner corporation, were indicted in a one count indictment for conspiracy under Section 37 of the Penal Code (18 U. S. C. A., Sec. 88) to commit "offenses against the United States" (App. 1).[1]

[1] R. 2.

All record references are to pagination in Transcript of Record filed in United States Supreme Court.

The object of the alleged unlawful agreement was the intended violation of Section 4(a), (50 U. S. C. A. App. par. 904), of the Emergency Price Control Act of 1942 and Maximum Price Regulations 193 and 445 promulgated under that Act.

The case proceeded to trial against petitioner corporation alone, the indictment against its co-defendants being variously disposed of as hereinafter stated. The evidence adduced against petitioner at the trial in support of the alleged conspiracy merely established that a single sale at lawful ceiling price had been consummated between the Old Monastery Company of Seattle, Washington, as seller, and Walter A. Renken, a resident of Charleston, S. C., as buyer (App. 29 et seq.).[2]

In this transaction, R. Harold Ostrow, the then President of the petitioner corporation, acted for the corporation and Defendant Joseph N. Davis represented the buyer, Renken. There was evidence through Davis, who plead guilty and testified for the government, that he had paid Ostrow personally in cash a sum of money in excess of the lawful selling price. There was no evidence that the corporation had received any of the excess cash and there was positive unrefuted evidence conclusively negativing any inference that it might have. Davis lives in Greenville, S. C., but concluded the sale in San Francisco, where he met Defendant Ostrow by appointment (App. 30).[3] Ostrow, a resident of Seattle, Washington, more than three thousand (3,000) miles distant from the seat of the Trial Court at Greenville, S. C., was unable to attend the trial or participate in the proceedings by reason of a serious heart ailment from which he suffered. He tendered a plea of *nolo contendere* in absentia and offered to waive his right to be personally present and

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[2] R. 29-63.

[3] R. 30.

to submit to the judgment of the court. The Trial Court, upon investigation of his physical condition, accepted Ostrows' plea of *nolo contendere* (App. 5, 62),[4] and entered judgment against him thereon in his absence. The indictment against the Defendant Renken was nolled.

Various questions were seasonably urged in the Trial Court either by demurrer or motion to quash, or by motion for a directed verdict, or a new trial. Included among these were the sufficiency of the indictment and the evidence and that the Office of Price Administration regulations which formed the substantive basis for the alleged conspiracy are unconstitutional on their face in that they contravene Article 21, Section 2, of the Constitution.

The court below affirmed the Trial Court which declined to consider the constitutional challenge directed against the regulation, holding:

> "I must conclude that this Court has no jurisdiction to determine the validity of the regulations involved in this controversy upon the ground that such regulations are unconstitutional, or upon any other grounds" (*U. S.* v. *Renken*, 55 F. Supp. 1, 9).

In affirming the Trial Court's conclusion that it lacked jurisdiction, the court below held that the United States Emergency Court of Appeals was vested with exclusive jurisdiction to determine the validity of the Office of Price Administration regulation drawn into issue in this conspiracy indictment. This is in direct conflict with the determination by that court in *Taub, et al.*, v. *Price Administrator*, now pending on petition for a writ of certiorari in this Court, No. 195, which holds that the United States Emergency Court of Appeals likewise has no jurisdiction over the same issue.

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[4] R. 5, 62.

Jurisdictional Statement

The jurisdiction of this Court to entertain this petition for a writ of certiorari to review the judgment below is invoked under favor of Section 240 of the Judicial Code, as amended, Title 28, U. S. C. A. Sec. 347:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ or error or appeal."

The judgment below against which this petition for a writ of certiorari is directed was entered on June 12, 1945.

Questions Presented

The questions presented by petitioners are as follows:

1. Is not an indictment for a conspiracy which denounces an agreement to do a lawful act—selling distilled spirits—in an unlawful manner—at prices in excess of the prescribed maximum—fatally defective in the absence of any allegation explaining the plan or scheme which is the gist of the denounced crime inasmuch as the words buy, sell and deliver have per se no sinister or criminal connotation?

2. Does the District Court in an indictment for conspiracy have jurisdiction to determine the constitutional validity of Office of Price Administration regulations which form the substantive basis for the alleged criminal

agreement where the claimed constitutional infirmity is apparent on the face of the regulation?

3. Inasmuch as the court below holds that the District Court is without jurisdiction to determine the constitutional validity of an Office of Price Administration regulation drawn into issue in an indictment for conspiracy under 18 U. S. C. A., Sec. 88, and concludes that the United States Emergency Court of Appeals has sole jurisdiction of such issue and the United States Emergency Court of Appeals has held that it lacks jurisdiction, is 18 U. S. C. A., Sec. 88, a lawful vehicle for prosecuting alleged agreements to violate Section 4(a) of the Emergency Price Control Act of 1942, as amended, particularly in view of the specific provision of that section condemning such agreements as substantive offenses under the Emergency Price Control Act.

4. Where substantive offense, by its inherent nature as here, requires plurality of persons and proof shows that there is an identity of personnel in the conspiracy and in the consummated substantive offense, can such participants be lawfully prosecuted for conspiracy to commit the identical substantive offense?

5. Where the proof in a conspiracy case conclusively establishes that petitioner corporation neither received nor was to receive any benefit from the conspiracy, does evidence that the petitioner corporation was availed of by its then president for his personal advantage and to its actual detriment justify submission of case against corporation to the jury?

Reasons Relied on for Allowance of Writ of Certiorari

1. The questions presented for consideration involve the determination of problems of jurisdiction and procedure under an important federal statute which vitally

affect the orderly administration of justice. These questions have not been heretofore presented for consideration here and should be settled by this Court.

2. The decision of the court below that the United States Emergency Court of Appeals is the sole forum to which may be addressed a constitutional challenge of the validity of an Office of Price Administration regulation drawn into issue in an indictment for conspiracy is in direct conflict with the decision of the United States Emergency Court of Appeals in *Taub, et al.*, v. *Price Administrator*, decided June 6, 1945, now pending on petition for a writ of certiorari in this Court. This conflict on an important question of Federal law should be settled by this Court.

3. The extent to which the conspiracy statute (18 U. S. C. A., Sec. 88) is applicable to a substantive offense whose nature necessarily involves the mutual cooperation of two or more persons where the substantive offense was in fact consummated by the identical persons charged with conspiracy to commit the same offense presents an important question of Federal law which should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari may issue out of and under the hand and seal of this Court directed to the United States Circuit Court of Appeals, Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said United States Circuit Court of Appeals, Fourth Circuit, in said cause therein entitled The Old Monastery Company, Appellant, v. United States of America, Appellee, No. 9177, to the end that said cause may be reviewed and

determined by this Court and that judgment of said United States Circuit Court of Appeals, Fourth Circuit, in said cause may be reversed by this Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

Argument

I. The Indictment Is Fatally Defective Because It Wholly Omits to Plead Any Facts Showing the Plan and Scheme By Means of Which the Alleged Conspiracy Was to Be Consummated.

It is elemental that an indictment should inform the accused of the offense charged, with sufficient particularity to enable him to intelligently interpose his defense.[5]

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[5] *Lynch* v. *United States* (C. C. A. 8), 10 F. (2d) 947, quoting at page 948: "In United States v. Hess, 124 U. S. 483, 8 S. Ct., 31 L. Ed. 516, declared: 'The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may decide whether

It is similarly fundamental that the accused is presumed to have only such information concerning the alleged crime as can be ascertained from the indictment itself.[6]

The essence of the crime of conspiracy the courts have declared over and over again is the unlawful agreement.[7]

In the indictment at bar, there is not a single line nor syllable of explanation of this "agreement" which is concededly the very heart of the offense. To aver in a pleading that there is an agreement is simply to plead a legal conclusion. Could an agreement in a civil case be properly

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they are sufficient in law to support a conviction, if one should be had.'"; *Boykin, et al.*, v. *United States* (C. C. A. 5), 11 F. (2d) 484, 485; *Elder* v. *United States* (C. C. A. 9) 142 F. (2d) 199, 200; *Belvin, et al.* v. *United States* (C. C. A. 4) 12 F. (2d) 548, 550; *Moore* v. *United States* (C. C. A. 5) 128 F. (2d) 974; *United States Constitution Amendment 6.*

[6] *Lynch* v. *United States, supra,* Footnote 5, states: "Where one is indicted for a serious offense, the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on the presumption that the defendant does not know the facts that the prosecutor thinks makes him guilty and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment clearly discloses the earmarks, the circumstances and facts surrounding the case of the alleged offense, so the defendant can identify, procure witnesses and make defense to it. *Fontana* v. *United States* (C. C. A.), 262 F. 283, 287; *Miller* v. *United States,* 133 F. 337, 341, 66 C. C. A. 399."

[7] *United States* v. *Kissel,* 218 U. S. 601, 608, 31 S. Ct. 124, 126, 54 L. Ed. 1168; *Braverman* v. *United States,* 125 F. (2d) 293, certiorari granted, 62 S. Ct. 1037, 315 U. S. 653, 86 L. Ed. 1733; *Shannabarger* v. *United States,* 99 F. (2d) 957, 961, states: "It is a settled rule of law that 'In conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged.'"

The Court in *United States* v. *Perlstein,* 120 F. (2d) 276, 280, states: "The gist of any conspiracy charge is not the objective of the conspiracy but the unlawful agreement or combination."

See also: *Kitt* v. *United States* (C. C. A. 4), 132 F. (2d) 920, 921; *Pettibone* v. *United States,* 148 U. S. 203, 13 S. Ct. 542, 37 L. Ed. 419; *Proffitt* v. *United States,* 264 F. 299; *Anderson* v. *United States,* 260 F. 557; *United States* v. *Olmstead, et al.,* 5 F. (2d) 712, 713; *Lynch* v. *Magnavox Co., et al.,* (C. C. A. 9), 94 F. (2d) 883, 889; *Marino* v. *United States* (C. C. A. 9), 91 F. (2d) 691, 693.

plead by simply alleging that the parties "agreed" without a recitation of the *facts* constituting the "agreement" relied upon by the pleader? To state the question is to answer it. Obviously such a pleading which sought to assert rights or impose duties growing out of a specific agreement would state no cause of action. There is no rule of law and certainly no principle of logic or reason that should require less particularity in an indictment charging a crime than in a complaint upon contract in a civil action. If any distinction is justified between the requisite degree of particularity in criminal as distinguished from civil pleading, the emphasis should be upon the former, particularly where, as in the case at bar, the indictment by the magic invocation of the conspiracy statutes transmutes a substantive misdemeanor into a felony and by the same doubtful legerdemain brings within the ambit of jurisdiction in South Carolina a corporation domiciled in Seattle, Washington, 3500 miles distant.

On this point the court below cited the opinion of the Trial Court, overruling the demurrer and motion to quash (*U. S. v. Renken*, 55 F. Sup. 1, 5):

> "The gist of the crime of conspiracy is the unlawful agreement. The counts charging conspiracy in these indictments charge that there was such an unlawful agreement. Its *terms* and *objects* are sufficiently described. It is a well settled principle of law that the unlawful *objects* of a conspiracy need not be described with the same particularity as is required in charging the commission of the substantive crime" (App. 17).[8] (Italics supplied)

We, of course, fully agree that the unlawful *objects* of a conspiracy need not be described with the same particularity as is required in charging the commission of a sub-

[8] R. 17.

stantive crime. But we respectfully submit that the courts below fell into the error of confusing "terms" and "objects". As to the latter, the indictment probably speaks with sufficient particularity. As to the former, it is silent. That omission is the gravamen of our complaint on this point and renders the indictment fatally defective. The contrast between the absence of language describing the terms of the unlawful agreement in this case is striking when compared to other conspiracy indictments which the Fourth Circuit has had occasion to review.[9]

The court below relied upon the *Hill* case (42 F. (2d) 812). It is readily distinguishable. There the use of the word "smuggle" alone removed all uncertainty and ambiguity. For that word, in the language of Judge Parker (*Hill* v. *U. S., supra,* page 814) "has a well understood meaning at common law signifying a bringing on shore or carrying from the shore of goods, wares and merchandise for which the duty has not been paid or goods, the importation or exportation thereof which is prohibited".

In the indictment at bar, there are no words of similar import or elasticity which by their very use alone spell out the elements of the prescribed agreement. The words "buy, sell and deliver" unlike the word "smuggle" have no sinister or criminal connotation.

It is the doing of a *lawful act,* i.e., the buying, selling or delivering of packaged distilled spirits, in an *unlawful* manner, i.e., at prices in excess of ceiling prices, that constitutes the substantive basis for the charged conspiracy. It is this distinction which renders the indictment fatally defective by omitting in any wise to describe the terms of the alleged conspiracy.

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[9] *Belvin, et al.,* v. *United States* (C. C. A. 4), 12 F. (2d) 548, 550; *United States* v. *Direct Sales Co., Inc.* (C. C. A. 4), 131 F. (2d) 835; affirmed; *Direct Sales Co., Inc.,* v. *United States of America,* 319 U. S. 703, 87 L. Ed. 1674.

II. The District Court Had Jurisdiction to Determine the Constitutional Issue Raised by Petitioner's Demurrer.

Petitioner by demurrer claimed that the indictment was invalid in that it contravened the Twenty-First Amendment, its contention being that the application of the Emergency Price Control Act of 1942, as amended, to intoxicating liquors and the regulations promulgated thereunder conflict with Section 2 of Article 21 of the Constitution. The Trial Court, after a scholarly analysis of petitioner's contentions and the precedents applicable thereto, concluded (apparently with reluctance) that it was without jurisdiction to decide the constitutional issue thus presented. It bottomed its assumed lack of jurisdiction upon its construction of the then recently decided *Yakus* case.[10]

While conceding that from the explicit language of Chief Justice Stone the question was open, the District Court arrived at its conclusion by adopting what it conceived to be the true meaning of the *Yakus* case [11] as evaluated by its interpretation of Mr. Justice Rutledge's dissenting opinion. In this we submit the Trial Court was wrong.

District Courts concededly derive their power and jurisdiction from the legislature. The jurisdiction of the district court over the crime of conspiracy is conferred by Criminal Code, Sec. 340, 18 U. S. C. A., Sec. 546. Once conferred, that power is obviously plenary. It is "a broad and comprehensive grant and gives the courts named power to try every criminal case cognizable under authority of the United States subject to the controlling provisions of the Constitution." [12]

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[10] *Yakus* v. *United States,* 321 U. S. 414, 88 L. Ed. 653.

[11] *Yakus* v. *United States, supra,* at page 679.

[12] *Simons* v. *United States,* 119 F. (2d) 539, 544, citing *Patton* v. *United States,* 281 U. S. 276, 298.

Neither the opinion of the Court nor Mr. Justice Rutledge's dissenting opinion considered the question of constitutionality in the perspective of an *indictment for conspiracy.* All that was before the Court was the review of a judgment affirming "judgments of the District Court of the United States for the District of Massachusetts convicting defendants, upon verdicts of guilty, of *violations of the Emergency Price Control Act.*"

Considering that fact, coupled with the express declaration by the Chief Justice [13] that: "We have no occasion to decide whether one charged with criminal violation of a duly promulgated regulation may defend on the ground that the regulation is unconstitutional on its face", it is difficult to comprehend the basis for the conclusion reached by the Trial Court that it lacked jurisdiction to decide the constitutional issue before it in a conspiracy case.

The court below in affirming the District Court's asserted lack of jurisdiction, held that petitioner's remedy lay in the United States Emergency Court of Appeals as prescribed by Section 204(e) of the Emergency Price Control Act of 1942, as amended in June 1944, approximately two months after the decision of the Trial Court. In the light of the pronouncement of the United States Emergency Court of Appeals in *Taub, et al.,* v. *Price Administrator,* now pending before this Court on petition for a writ of certiorari, recourse to the remedy suggested by the court below would have been futile and would have left the petitioner in precisely the position in which it now finds itself on this issue.

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[13] *Yakus* v. *United States, ibid.,* at page 672.

III. The Conspiracy Here Charged Required Participation in the Consummated Substantive Offense of the Same Participants and Hence the Conviction for Conspiracy to Commit the Identical Substantive Offense Is Erroneous.

Four individuals, including the petitioner corporation, were indicted in this case. The substantive crime which it is alleged they conspired to commit consisted of buying, selling and delivering alcoholic beverages at prices in excess of the authorized maximum of the Emergency Price Control Act. The proof showed that but one sale and purchase was made. Twelve Hundred (1200) cases of whiskey were sold by the Old Monastery Company, petitioner here, to its co-defendant, Renken (App. 29 et seq.).[14] The other participants were Harold Ostrow, the then President of the petitioner corporation, and Davis, agent for Renken. No other defendants were named in the indictment (App. 1 et seq.),[15] and no other participants, either by name or otherwise, were alleged in the indictment to have participated in the conspiracy. Thus we have a situation where there is an identity of personnel in the conspiracy and the consummated substantive offense which formed the basis for the alleged conspiracy.

The nature of the substantive offense by its very definition contemplates and connotes the participation of a plurality of persons. One cannot buy except from a seller, nor can one sell except to a buyer. In such a situation the authorities[16] uniformly hold that the so-called conspiracy is itself

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[14] R. 29-63.

[15] R. 1-4.

[16] *Lisansky* v. *United States* (C. C. A. 4), 31 F. (2d), 846, 850; *United States* v. *Zeuli* (C. C. A. 2), 137 F. (2d), 836, 845; *Vannata* v. *United States* (C. C. A. 2), 289 F. 425, 427; *United States* v. *Dietrich*, 126 F. 664, 667; *United States* v. *Hagan*, 27 F. Sup. 814; *Curtis* v. *United States*, 67 F. (2d), 943, 947; *United States* v. *Katz*, 70 L. Ed., 986, 988; *United States* v. *Sager*, 49 F. (2d), 725, 727.

the substantive offense so as to preclude either prosecution or conviction for conspiracy to commit the identical substantive offense.

The most recent pronouncement on the subject is *United States* v. *Zeuli*.[17] In this connection a unique feature of the Emergency Price Control Act has significance because it obviously indicates that the Congress was cognizant of the impropriety of invoking sanctions for a conspiracy to commit substantive offenses requiring plurality of participants. Thus, Section 4(a) not only condemns as unlawful the sale of any commodity in violation of a price schedule but declares it to be unlawful to offer, solicit, attempt or *agree* to do any of the foregoing. Maximum Price Regulation 193, Section 1420.1, and Maximum Price Regulation 445, Section 7.8, both contain language consistent with this statutory proscription, for they not only condemn the sale and delivery of domestic distilled spirits for prices in excess of the regulation but likewise denounce an agreement to do any of the foregoing.

IV. There Was a Total Failure of Evidence to Show That the Petitioner Corporation Was to Receive Any Benefit from the Conspiracy.

Giving the evidence the strongest interpretation in favor of the government and against petitioner, all that can be

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[17] *United States* v. *Zeuli*, supra, Footnote 16, at page 836, the Court stated: "Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. United States v. Dietrich, C. C., 126 F. 664 (Van Devanter and Munger, JJ); United States v. New York Central & H. R. R. Co., C. C., 146 F. 298 (Holt, D. J.); United States v. Sager, 2 Cir., 49 F. 2d, 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U. S. 354, 355, 46 S. Ct. 513, 70 L. Ed. 986; Gebardi v. United States, 287 U. S. 112, 122, 53 S. Ct. 35, 77 L. Ed. 206, 84 A. L. R. 370."

claimed for it is that the Old Monastery Company sold Twelve Hundred (1200) cases of its whiskey to Renken for $32,000.00, the established and lawful selling price for that commodity. This sale, insofar as the corporation was concerned, was, as characterized by Renken, a government witness: "* * * a regular commercial transaction * * *".

No evidence whatsoever was offered by the government proving or even tending to prove that the corporation received a single penny in excess of the regular OPA price paid to it by draft on Renken upon presentation of bills of lading in the same manner as any other legitimate commercial transaction. On the contrary, the defendant on its behalf, through its General Manager, an outside Auditor, and its bank, established beyond any question that the only payment received for the Twelve Hundred (1200) cases of whiskey which it sold was the lawful consideration paid to it by Renken as aforesaid.

Consequently, the only possible theory upon which the corporation can be held to have been a participant in what the government dramatizes as the "conspiracy" but which in fact was but a single completed sale was through the acts ascribed to its President, Ostrow, by the confessed progenitor of the conspiracy, Davis. According to Davis, he paid Ostrow personally the claimed $16,000.00 in "side money" in cash. While it may be of no legal significance, it may be noted in passing that this payment was allegedly made, not in the office of the company in Seattle, but to Ostrow at San Francisco, eight hundred (800) miles distant.

We are not contending, of course, that a corporation can avoid ressponsibility for conspiracy because of necessity it acts through its representative or agent. Nor do we claim that a corporation can avoid responsibility for its participation in a conspiracy through an agent who has exceeded his authority or acted *ultra vires* in acting for his

corporation in furtherance of such conspiracy. But the fundamental postulate to corporate liability for conspiracy through the acts of its agents and representatives is that such acts *must be for the benefit of the corporation.* Where an agent or officer of a corporation participates in a conspiracy in his official capacity as such officer or agent, or avails himself of the corporation to further the ends of the conspiracy in which he is participating for his own personal advantage, then the rule is clear that liability of the corporation for conspiracy cannot be imputed to it through such acts of its agent.

On this point, textbooks as well as the courts are in universal agreement. Thompson on Corporations (Vol. 7, 3rd Edition, Sec. 5430) declares:

> "A corporation is liable for conspiracy to the same extent as are individuals under like circumstances though the act was outside the scope of the corporate powers * * * A *corporation will not be liable for a conspiracy in which it did not participate but was conducted by officers for their own benefit* * * *".

The principle enunciated in Thompson, *supra,* stems from the landmark case of *New York Central Railroad* v. *United States.*[18] That case, decided in 1908, involved, as the Court will recall, the interpretation of the Elkins Act with respect to rebates. After reaffirming the principle that a corporation may be liable to damages in actions for tort, the Court proceeds to a discussion of the basis for imputing liability to a corporation for the acts of its agents, even though wrongfully done or even against the express orders of the

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[18] 212 U. S. 481, 492, 495, 29 S. Ct. 304, 53 L. Ed. 613.

principal. The basis for liability, declares the Court, is: "because the act is done for the benefit of the principal".[19]

The government's case, instead of showing "benefits" to the corporation growing out of the personal acts of its then president, demonstrates conclusively that the acts attributed to him by Davis, if true, were definitely to its detriment. In this state of the record, there was no evidence imputing liability to the corporation which justified submission of the case to the jury and the Trial Court should have granted petitioner's motion for a directed verdict.

Conclusion

The facts in this case warrant comment on the tendency of prosecuting agencies of the government to invoke the conspiracy statute with not too fine a discrimination as to its justifiable application to a particular case. Courts and writers on legal subjects have noted this tendency with misgiving.

In *Vannata* v. *United States, supra*, Judge Hough commenting on the use of the conspiracy statute in Volstead Act violations (under which, unlike here, sale but not purchase was forbidden) made a cogent observation, which is particularly apt in these strenuous days when new offenses (as at bar) are created daily by administrative fiat under emergency legislation:

> "If any right-minded layman of intelligence were told to read section 29 of the Volstead Act, he would think he knew just what it meant to sell whiskey. If counsel learned in the law then told him that it was optional with the prosecutor to utilize section 37 of the Criminal Code to quadruplicate the penalty, he would incline to think of schoolbook information as to how certain tyrants put their laws on pillars so high that plain citi-

[19] Ibid., Footnote 18.

zens could not mark, learn, and inwardly digest the same. In the long run it is by the opinion of an intelligent laity that laws and their enforcement are judged."

All of which is respectfully submitted.

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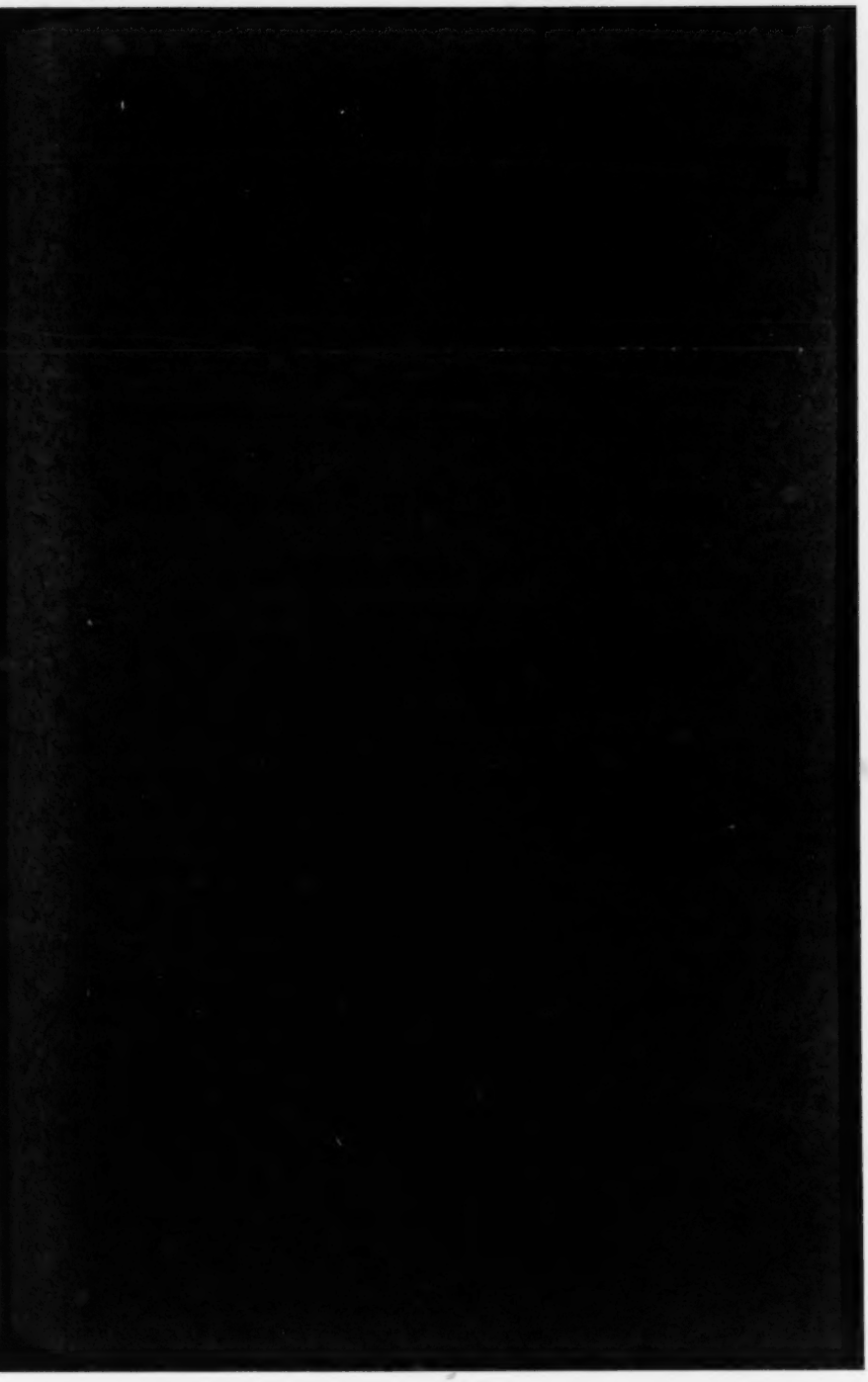

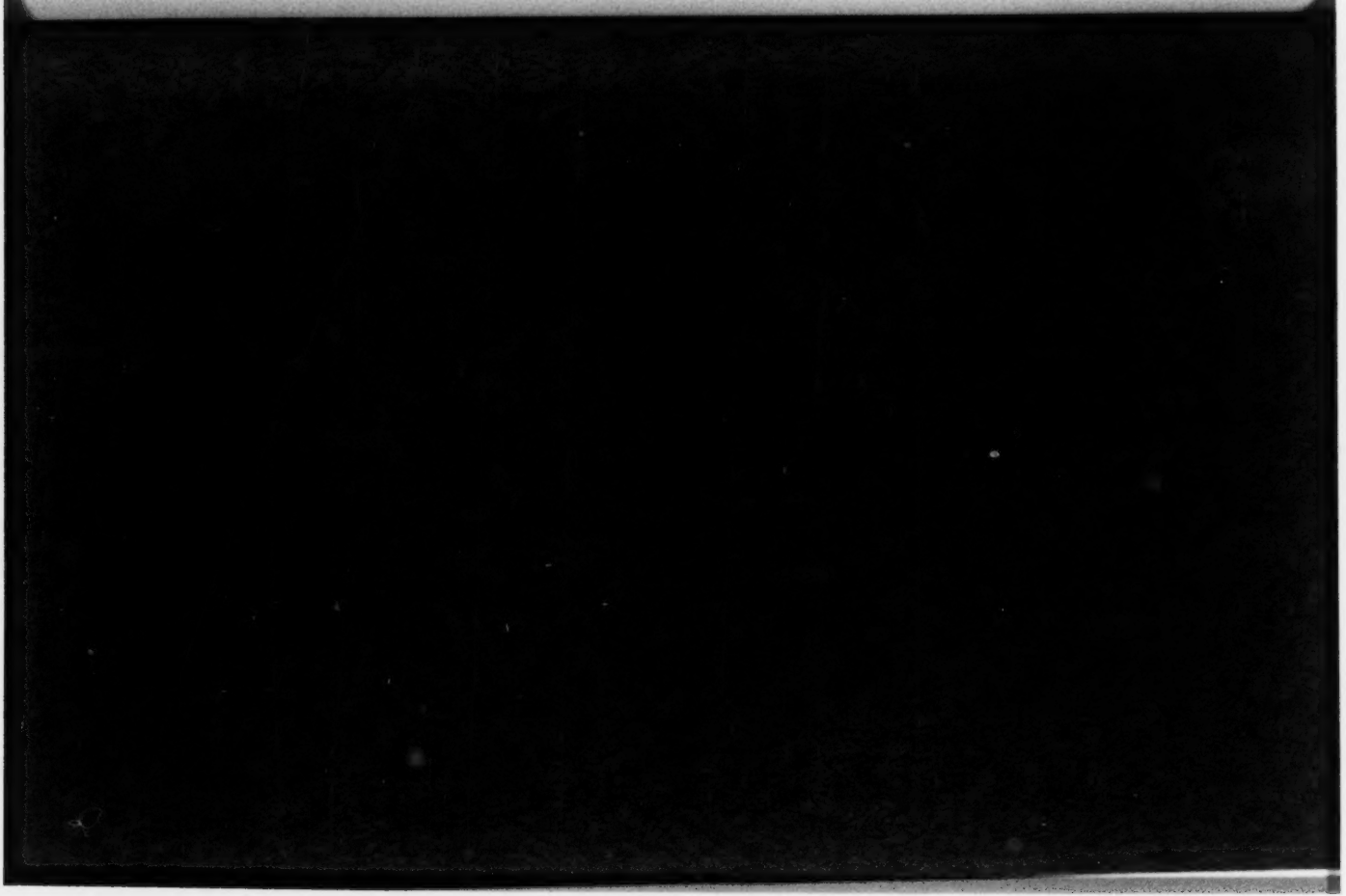

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 229

THE OLD MONASTERY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 96–103) is reported at 147 F. (2d) 905. The opinion of the district court overruling petitioner's demurrer and motion to quash the indictment (R. 11–27) is reported *sub nom. United States* v. *Renken* at 55 F. Supp. 1.[1]

JURISDICTION

The judgment of the circuit court of appeals was entered February 13, 1945 (R. 103), and a petition for rehearing (R. 105–109) was denied

[1] This opinion involved petitioner's case and three related cases. The portion dealing with petitioner's objections to the indictment appears at pages 17–27 of the record.

June 12, 1945 (R. 110). The petition for a writ of certiorari was filed July 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment, which charged petitioner and others with conspiracy to violate maximum price regulations, is sufficient to support petitioner's conviction.

2. Whether, assuming that the trial court had jurisdiction to determine petitioner's contention that the price regulations involved are constitutionally invalid, there is any merit in such contention.

3. Whether the conspiracy prosecution was barred because commission of the substantive offense entailed cooperative action.

4. Whether petitioner as a corporation could be guilty as a conspirator, even though the evidence did not show that it either received or was to receive any benefit from the conspiracy charged.

STATUTORY AND OTHER PROVISIONS INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix, pp. 13–16. The maximum price regulations involved are printed in the Federal Register, 7 F. R. 6006–6007; 8 F. R. 11161–11174.

STATEMENT

A single count indictment was returned against petitioner, Walter A. Renken, R. Harold Ostrow, petitioner's president, and Joseph N. Davis, in the United States District Court for the Western District of South Carolina, charging them with conspiracy to violate Section 4 (a) of the Emergency Price Control Act of 1942 and Maximum Price Regulations 193 and 445 promulgated under the Act, in that they would buy, sell, and deliver packaged distilled spirits at prices in excess of those permitted by the regulations. Seven overt acts in furtherance of the conspiracy were alleged. (R. 1–4.) Petitioner and Ostrow filed a demurrer and motion to quash the indictment, in which it was contended, *inter alia,* that under the Twenty-first Amendment of the Constitution, repealing the Eighteenth Amendment, Congress has no power to regulate the price of intoxicating liquors, and that the indictment was insufficient in several other respects (R. 7–11). The district court overruled the demurrer and motion to quash (R. 11–27), and on October 9, 1944, petitioner pleaded not guilty, and defendant Ostrow pleaded *nolo contendere* (R. 4–5).[2] After a trial by jury petitioner was convicted, and it was sentenced on October 18, 1944, to pay a fine of $10,000 (R. 5, 77–78). On appeal to the Circuit Court of Ap-

[2] Davis also pleaded *nolo contendere;* the indictment was dismissed as to Renken (see R. 97) because of the pendency of other indictments.

peals for the Fourth Circuit, the judgment of conviction was affirmed (R. 96–103).[2]

ARGUMENT

1. Petitioner contends (Pet. 4, 9–12) that the indictment is insufficient for the reason that it failed to allege any facts showing the plan and scheme by means of which the conspiracy was to be consummated. We submit that the contention is without merit.

The indictment (R. 1–4), in the language of the conspiracy statute (Appendix, p. 13), alleged that the defendants (1) unlawfully conspired (2) to commit certain specified offenses against the United States, in that they would buy, sell, and deliver packaged distilled spirits at prices in excess of the maximum prices authorized by the applicable price regulations promulgated pursuant to the Emergency Price Control Act of 1942, and (3) that the defendants performed various specified acts in furtherance of the conspiracy. This was plainly adequate.

It is well settled that an indictment charging a conspiracy to violate a criminal statute is sufficient if it alleges the conspiracy in the language of Section 37 of the Criminal Code and contains such a description of the object of the conspiracy as

[2] The questions presented by the petition do not require a delineation of the evidence adduced at the trial. Such of the evidence as is necessary for a consideration of those questions is summarized in the opinion of the court below (R. 102–103), and is set forth in the Argument.

fairly and reasonably informs the defendants of the character of the offense charged. *Culp* v. *United States,* 131 F. (2d) 93, 99 (C. C. A. 8); *Miller* v. *United States,* 125 F. (2d) 517, 518 (C. C. A. 6), certiorari denied, 316 U. S. 687; *Pullin* v. *United States,* 104 F. (2d) 57 (C. C. A. 5), certiorari denied, 308 U. S. 552; *Beland* v. *United States,* 100 F. (2d) 289 (C. C. A. 5), certiorari denied, 306 U. S. 636; *Center* v. *United States,* 96 F. (2d) 127 (C. C. A. 4); *Hill* v. *United States,* 42 F. (2d) 812 (C. C. A. 4), certiorari denied, 282 U. S. 884; *Jelke* v. *United States,* 255 Fed. 264, 275 (C. C. A. 7); *United States* v. *White,* 171 Fed. 775 (C. C. S. D. N. Y.). The details of the plan whereby the law is to be violated need not be set forth, and the charge that the defendants conspired to commit the forbidden acts necessarily imports an unlawful motive. *Pierce* v. *United States,* 252 U. S. 239, 243–244; *Haynes* v. *United States,* 4 F. (2d) 889 (C. C. A. 2), certiorari denied, 268 U. S. 703. Measured by these standards it is clear that the indictment was sufficient.[4]

2. Petitioner contends that the District Court in ruling, on its demurrer, that it lacked juris-

[4] That the acts of buying, selling, or delivering packaged distilled spirits may in themselves be lawful, as pointed out by petitioner (Pet. 12), is obviously without significance, since the indictment charged that the defendants conspired to do these acts in an unlawful manner, i. e., that they would buy, sell, and deliver liquor at prices greater than those permitted by the Act and the regulations.

diction under the decision of this Court in *Yakus* v. *United States,* 321 U. S. 414, to pass upon petitioner's contention that the Twenty-first Amendment barred Congress from establishing maximum prices for sales of intoxicating liquor, was in error because this Court's decision left open the question whether a regulation unconstitutional on its face could be attacked in a criminal prosecution for violation of the regulation and because the *Yakus* case was not a prosecution for conspiracy but for a substantive violation. Petitioner also urges that the Circuit Court of Appeals improperly held that under the amendment of June 30, 1944, adding subsection (e) to Section 204 of the Emergency Price Control Act (Appendix, pp. 14–16), which amendment had become effective at the time of the judgment of the District Court, petitioner's remedy was to attack the regulation's validity in the Emergency Court of Appeals and that its holding is in conflict with the subsequent decision in the Emergency Court of Appeals in *Taub* v. *Bowles,* now pending in this Court on petition for certiorari (No. 195), deciding that the amendment was not applicable to conspiracy prosecutions but only to prosecutions for substantive violations (Pet. 4–5, 6, 13–14). In the Government's brief in opposition in the *Taub* case it is contended that there is no conflict between the two decisions which calls for resolution (Br. 9), particularly in view of the modifica-

tion of Section 204 (e) on June 30, 1945 (Appendix, pp. 14–16), subsequent to both decisions, which permits Emergency Court of Appeals' consideration of a regulation's validity where a conspiracy prosecution is involved, thus rendering no longer of general importance the jurisdictional question which petitioner presents (pp. 8–9, 10).[5] In any event the merits of petitioner's contention based upon the Twenty-first Amendment was passed upon by the Circuit Court of Appeals and is clearly without substance, as is apparent from that decision and the decisions of the Emergency Court of Appeals in the *Taub* case and of the Circuit Court of Appeals for the Sixth Circuit in *Jatros* v. *Bowles*, 143 F. (2d) 453.[6] There is no decision to the contrary.

3. Petitioner next contends (Pet. 5, 15–16) that "the conspiracy here charged required participation in the consummated substantive offense of the same participants and hence the conviction for conspiracy to commit the identical substantive offense is erroneous." It is true that where it is impossible to commit a substantive offense without the

[5] It should be noted, additionally, that in the present case, unlike the *Taub* case, petitioner did not seek leave in the District Court after judgment of conviction to challenge the validity of the regulation in the Emergency Court of Appeals. Consequently, the court below, for this reason alone, was not required to determine the availability of a remedy in the Emergency Court of Appeals.

[6] See also the Government's brief in opposition in the *Taub* case, No. 195, p. 10.

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mutual cooperation of two or more persons, an agreement between the same parties to commit the offense is not an indictable conspiracy. See *Gebardi* v. *United States,* 287 U. S. 112, 122; *United States* v. *Katz,* 271 U. S. 354, 355; *United States* v. *Zeuli,* 137 F. (2d) 845, 846 (C. C. A. 2); *United States* v. *Sager,* 49 F. (2d) 725, 727 (C. C. A. 2); *Norris* v. *United States,* 34 F. (2d) 839, 841 (C. C. A. 3), reversed on other grounds, 281 U. S. 619; *United States* v. *N. Y. C. & H. R. R. Co.,* 146 Fed. 298, 303 (C. C. S. D. N. Y.); *United States* v. *Dietrich,* 126 Fed. 664, 667 (C. C. D. Neb.). But, as pointed out by the court below, "this principle is to be confined to very narrow limits" (R. 100). Thus, as indicated in *Gebardi* v. *United States, supra,* at p. 122, footnote 6, it has been held inapplicable where the substantive crime could be committed by a single individual (*Lisansky* v. *United States,* 31 F. (2d) 846 (C. C. A. 4), certiorari denied, 279 U. S. 873; *Laughter* v. *United States,* 259 Fed. 94, 97–98 (C. C. A. 6); *Chadwick* v. *United States,* 141 Fed. 225, 237 (C. C. A. 6)), and also where the conspiracy contemplated the cooperation of a greater number of parties than were necessary to the commission of the principal offense. *McKnight* v. *United States,* 252 Fed. 687, 689 (C. C. A. 8); *Thomas* v. *United States,* 156 Fed. 897, 905 (C. C. A. 8); cf. *Ex parte O'Leary,* 53 F. (2d) 956, 958 (C. C. A. 7); *Vannata* v. *United States,* 289 Fed. 424, 428 (C. C. A. 2).

Applying these considerations to the present case, we think the circuit court of appeals properly held that petitioner's contention is without merit for the reason that the conspiracy "embraces not merely the necessary parties to the illegal sale, the seller and the buyer, but other conspirators as well" (R. 100–101). The indictment named as conspirators petitioner, Ostrow, petitioner's president, Renken, and Davis (R. 1). Petitioner sold the liquor to Renken (R. 43–45). Davis, a salesman for a wine dealer not involved in the case, originated the scheme. He ascertained from Ostrow that petitioner would sell whiskey at prices in excess of those permitted by the maximum price regulations, and procured Renken, a wholesale dealer, to buy the whiskey from petitioner for resale to retailers who were also procured by Davis (R. 29–32).[7]

4. Finally, petitioner contends (Pet. 5, 16–19) that, since it is a corporation, the evidence was insufficient to establish its guilt of conspiracy, because such evidence did not show that it either received or was to receive any benefit from the conspiracy. Assuming that petitioner's appraisal of the evidence is justified (cf., however, R. 73–75),

[7] By the same token there is no merit in petitioner's further argument (Pet. 16) that the provision of Section 4 (a) of the Emergency Price Control Act (Appendix, p. 13), making it unlawful to agree to sell or buy any commodity in violation of any price regulation, precluded this prosecution for conspiracy under Section 37 of the Criminal Code.

we submit that the Circuit Court of Appeals properly held that benefit is not "a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact." (R. 101.)

It is plain, of course, that a corporation is criminally liable for participating in an illegal conspiracy. *Joplin Mercantile Co.* v. *United States,* 213 Fed. 926, 935–936 (C. C. A. 8), affirmed, 236 U. S. 531; *United States* v. *MacAndrews & Forbes Co.,* 149 Fed. 823, 835–836 (C. C. S. D. N. Y.). Since the statute punishes those who "conspire * * * to commit any offense against the United States," it is of no consequence that the conspirators may not expect to reap any pecuniary advantage from the conspiracy. Cf. *United States* v. *Bradford,* 148 Fed. 413, 422 (C. C. E. D. La.); *United States* v. *Newton,* 52 Fed. 275, 281 (S. D. Ia.); see also *Direct Sales Co.* v. *United States,* 319 U. S. 703, 713. And, of course, the fact that the conspirators do not receive any material benefit from the conspiracy is immaterial because the conspiracy is punishable whether or not its illegal objective is accomplished. *Goldman* v. *United States,* 245 U. S. 474, 477; *United States* v. *Rabinowich,* 238 U. S. 78, 86; *Williamson* v. *United States,* 207 U. S. 425, 447. Nor is there any reason for deviating from these principles in the case of a corporate defendant.[8] As

[8] Petitioner's reliance on *New York Central R. R.* v. *United States,* 212 U. S. 481, is misplaced. The Court in that case decided that a corporation is criminally responsible for

was properly held by the court below (R. 101–103), the guilt of petitioner depended upon whether the acts of Ostrow, its president, were his own individual acts or were undertaken in his capacity as an officer and representative of petitioner and were within the scope of his authority. The evidence, which is summarized in the opinion of the circuit court of appeals (R. 102–103), is undoubtedly sufficient to support the finding of the jury in this respect, and petitioner does not claim otherwise.

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illegal acts done by an authorized corporate agent in exercising the authority conferred upon him, as against the contention that a corporation owing to its nature could not commit the crime charged. The Court did not hold, as asserted by petitioner, that the basis of liability is that the corporation must benefit from the illegal acts. It observed that "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act * * * and whose knowledge and purposes may well be attributed to the corporation for which the agents act * * * and to give them [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at" (212 U. S. at 495–496). See also *State* v. *Salisbury Ice and Fuel Co.*, 166 N. C. 366, 369 (1914). To require, as a condition precedent for criminal corporate liability, that the corporation must profit by the crime, is manifestly a proposition without support in reason or policy.

CONCLUSION

The contentions urged in the petition for a writ of certiorari do not warrant further review by this Court. We therefore respectfully submit that the petition should be denied.

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AUGUST 1945.

APPENDIX

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; Public Law 108, approved June 30, 1945, 79th Cong., 1st sess.; 50 U. S. C. App., Supp. IV, 901 *et seq*), are as follows:

> Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> * * * * *
>
> Sec. 204. (d) * * * The Emergency Court of Appeals, and the Supreme Court

upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,*[*] involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated *or conspired*

[*] The words in italics were added by Public Law 108, approved June 30, 1945.

to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. * * *

(2) In any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

* * * * *

* * * If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding

under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

* * * * *

Sec. 205. (b) Any person who willfully violates any provision of section 4 of this Act, * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943